Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

Linh Dao, Quynh Dao, Luyen Daotien, Nguyen Daotien, Tam Daotien, *Petitioners.*

v.

Washington Township Healthcare District, Ahmed Sadiq, M.D., David Cheng, M.D., Does 1 through 100, *Respondents.*

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

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PETITION FOR A WRIT OF CERTIORARI

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Petitioners in propria persona
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QUESTION PRESENTED

Whether, consistent with the Fourteenth Amendment, a *de facto* primary healthcare provider, an active member of a patient's healthcare team who has demonstrated and disclosed ample knowledge of the subject to entitle her opinion to go to the jury, may be excluded from giving expert testimony when current law readily allows such testimony from those who treat the patient.

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OPINIONS BELOW

The California Court of Appeal issued its unpublished opinion in this case on June 23, 2006, [2006 Cal. App. Unpub. LEXIS 5398]. A copy of that opinion is attached as Appendix A. Petition for Rehearing in the Court of Appeal was denied on July 24, 2006. Appendix B is a copy of the decision of the trial court that was the subject of the Court of Appeal's review.

JURISDICTION

The California Supreme Court denied discretionary review on September 13, 2006. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no state shall… deny to any person within its jurisdiction the

equal protection of the laws."

STATEMENT OF THE CASE

A. Factual Background

This is a medical malpractice related case of abuse and neglect that resulted in the death of a mother and wife, petitioners' decedent, Hieu Vu (Vu) on September 19, 2001.

Vu was diagnosed at age 59, in December 1994 with Myelodysplastic Syndrome (MDS), an indolent blood disorder that required periodic packed red cell transfusions. The only known cure for MDS was a bone marrow or peripheral stem cell transplant.

With periodic red cell transfusions, iron, a part of hemoglobin, gets accumulated in transfusional patients' body over time, and needs to be chelated by the drug Desferal.

Dr. Ahmed Sadiq was Vu's primary care physician and hematologist from early 1995 to the end of June 2000 when he

abandoned her. Sadiq had neglected to chelate Vu's physiologically excessive iron with Desferal, and thereby caused her to have a secondary medical condition, iron overload, which in turn affected her body systemically, reaching critical stage at one point.

Linh Dao, a trained bio, bio-medical engineer, Vu's daughter and primary care giver was finally able to secure a Desferal prescription for Vu in April, 2000.

Dr. Peter Greenberg, Vu's treating hematologist at Stanford University referred her to the Stanford transplant program for a non-myeloablative peripheral stem cell transplant. Her transplant physician, Dr. Laura Johnston decided to hold it off since Vu was in no hematological distress, and Dr. Johnston would like to see her recover from her significant iron overload first. Vu had two perfect sibling matches.

Dr. David Cheng (Cheng) was Vu's primary care physician and hematologist from July 2000 to the day she died.

Thanks to Desferal, Vu's overall

condition was steadily improving. For example, her heart murmur, detected in December 1999 during a 2nd opinion consultation with Dr. Jeffrey Wolfe, a hematologist, and caused by excessive iron deposits in her mitral valve that prevented it from closing properly, was gone by April, 2001. Indeed, her medical conditions improved well enough that Dr. Byron Wilson, a consulting hematologist, recommended in this same April, 2001 report that transplant time be moved up.

Early September, 2001, as she was waiting to recover from iron overload, Vu was admitted to Washington Hospital (Washington) for sepsis, a blood infection. Iron overload makes people more susceptible to infections. All clinical indications showed that she had recovered from it, and was therefore moved from the emergency room to a regular hospital floor. She then developed a nosocomial urinary tract infection from the Foley catheter. She was not treated for this infection, and died from it.

B. Proceedings Below

In addition to the various causes of action, Petitioners sued for Negligent Infliction of Emotional Distress and Wrongful Death. This last cause of action survived all demurrers, but was eventually dismissed on Summary Judgment, at the last minute, right before cut-off time for such motion to be brought before trial. (The trial date was never changed.) Each Respondent supported its motion with a single expert witness' declaration that was based on the medical records alone.

Respondent Sadiq submitted a declaration from a hired gun, hematologist Jeanna Welborn, which petitioners specifically objected to being hearsay in its entirety. The Court of Appeal however deemed that petitioners specifically should have objected to it not being done under penalty of perjury. Pet. App. A9.

The Fifth Amended Complaint (FAC), which framed the issues that were attacked by the Summary Judgment, had alleged, in

addition to the relevant facts listed in the section A above, that Linh Dao, as the lead caregiver to Vu was a member of her healthcare team, and had at times given medical orders, performed functions of a primary care physician, and at one time, for example, even performed minor surgery to drain a wound on Vu's hand and put antibiotics in it because Sadiq had refused to care for the wound letting plasma oozing out of it for months.

Welborn's declaration directly attacked Linh Dao, citing her by name and listed the actions she had taken as "attempt to direct her mother's ongoing care".

In another attack, she cited " ...in November 2000, the patient refused platelet transfusions but accepted red blood cells ...), a clear reference to a standard of care Vu had chosen at the advice of Linh Dao, a standard of care approved and explained by Dr. Wilson in the report mentioned in the "Factual Background" above: "I agree with the patient and her daughter that platelets should be

given on a p.r.n. (as needed) basis for bleeding only as multiple platelet transfusions increase the risk for transplant complication later on..."

All in all, the respondents had coordinated their declarations with Welborn claiming Vu died of an infection, but was not specific as to what type of infection it was. Cheng's expert witness however could not even admit to Vu having iron overload, claimed her MDS had progressed instead. And Washington's expert, nurse Cadet, only said she reviewed the medical records which reflected that Washington's nurses only followed doctors' orders.

When petitioners illustrated a fact which contradicted Cadet's claim she reviewed the medical records, the Court of Appeal ruled in the last paragraph of its opinion that petitioners could not show that Cadet did not review the medical records because one needs to be an expert to review the medical records. Not only did the Court of Appeal gut Petitioners' Opposition to the

Summary Judgment Motions by excluding Linh Dao's declaration, it also dismissed all the things we pointed out as disputes of material facts as percipients' witnesses.

Petitioners note that the facts cited above came almost exclusively from the medical records offered into evidence by the Respondents themselves.

REASONS FOR GRANTING THE WRIT

As Petitioners pointed out to the California Supreme Court, given the state of our healthcare system, knowledgeable caregivers and patient advocates play an important role in the care of patients, and need to be recognized by the courts. All the facts and procedures we listed above are in the records, on file with the California Court of Appeal. Here, for example, a practicing hematologist, Dr. Byron Wilson, already concurred with Linh Dao on hematology standard of care, as well as standard of care in the preparation for a transplant so as to avoid

complications in post- non-myeloablative peripheral stem cell transplant [I agree with the patient and her daughter that platelets should be given on a p.r.n. (as needed) basis for bleeding only as multiple platelet transfusions increase the risk for transplant complication later on. (Appellant's Appendix 455)]. Dr. Wilson also relied on Linh Dao for the needed medical information to treat Vu (AA 454-456):

" SOCIAL HISTORY: ....The patient lives with her daughter. Her daughter was in the room today and served as an important source of medical information."

As we noted above, Linh Dao was attacked for a medical decision taken, yet the Court of Appeal refused to allow her the right to explain or opine as to why such standard of care was correct to defend herself.

Also, the Court of Appeal deemed Linh Dao was not qualified to review the medical records to glean any facts, yet it **determined** in the 1st paragraph of the 2nd page of its opinion the **fact** that "Dr. Wolfe

recommended a bone marrow aspirate with cytogenetics to assess the disease." **on its own** without the input from any of the respondents' expert witnesses.

Patient Advocates such as Linh Dao, are the *de facto* healthcare providers to the patients, and are often more knowledgeable about what is going on with the patients they care for than the patients' very own primary care physicians who most of the time are too busy to listen. They improve patients'care, limit waste and abuse, minimize medical errors and negligence, and help make healthcare delivery more efficient and less expensive. In effect, they help not only the patients, but also the doctors and nurses they interact with. Their expert testimony can help any of the parties involved since they are the people who are the most intimate with medical facts and standard of care as a results of those facts. In this case we have a percipient witness who could provide facts and opinions, the iron overload that has improved (this fact and opinion would help

Sadiq), how Vu was urinary tract became infected and whether she was in the condition to be able to receive treatment for the urinary tract infection. All these facts and opinions jived with what was already in the medical records provided by none other than the Respondents themselves.

Moreover, as petitioners pointed out to both the Court of Appeal and the California Supreme Court, the treating physicians, Drs. Peter Greenberg, Laura Johnston, Byron Wilson, and cardiologist David Berke, the epidemiologist and the treating nurses would already all be expert witnesses at trial, and would dispute the medical opinions and facts given by the respondents' experts. In *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39, the California Supreme Court held: "For such a witness, no expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience. This may well include opinions regarding causation and standard of care because such issues are

inherent in ...[their].... work."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Linh Dao, Quynh Dao, LuyenDaotien,
Nguyen Daotien and Tam Daotien,
Petitioners in propria persona

Date: December 12, 2006